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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 160.

GREER COUNTY, OKLAHOMA TERRITORY,

PLAINTIFF IN ERROR,

vs.

THE STATE OF TEXAS, DEFENDANT IN ERROR.

Error to the Court of Civil Appeals for the Third Supreme Judicial District of Texas.

BRIEF OF PLAINTIFF IN ERROR.

H. N. ATKINSON,
GEO. CLARK,
D. C. BOLINGER,
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STATEMENT OF THE CASE.

This is a suit of trespass to try title by the State of Texas against Greer County, Oklahoma Territory, and the executors, heirs and devisees of William Cameron, deceased, to recover the title and possession of four leagues of land lying in Hockley and Cochran Counties, in the State of Texas, being the four leagues of school land for which patents had issued, under the provisions of the constitution and laws of the State of Texas to Greer County, during the time that the territory now embraced in Greer County, Oklahoma Territory was claimed by the State of Texas as a part of her territory.

It is alleged in the petition that the defendants claimed title to said lands under said patents, but that the patents were issued without authority of law and are void, and there was a prayer for cancellation.

The defendants answered, the Camerons setting up title under conveyances from Greer County, Texas, to 10,476 acres of land, and Greer County, Oklahoma Territory, set-

ting up title to 7,236 acres, being the balance of said four leagues unsold by Greer County, Texas.

Upon the trial there was a severance and separate judgment was rendered against Greer County, Oklahoma Territory, for that part of the land claimed by it, from which judgment said defendant sued out writ of error.

The cause was tried by the Court without a jury, upon an agreed statement of facts, which is embodied in a finding of facts by the Court. (R. p. 14).

The trial Court found as a conclusion of law that: by the decision of this Court in the case of United States vs. Texas (162 U. S., 1) that the territory over which the State of Texas claimed jurisdiction, and which the State had attempted to organize as a County of the State under the name of Greer County, was not, and had never been, a part of the territory of the State; and that the act creating said territory into a County of Texas was without authority and void, and the issuance of the patents for the four leagues of school lands to said County under the provisions of the general law authorizing the Commissioner of the General Land Office to issue such patents to each organized County of this State was without legal authority and the patents were void.

Upon the same conclusions of fact and law judgment was rendered in favor of the State against the heirs and executors of William Cameron, deceased, for that portion of the land claimed by them which was affirmed by the Court of Civil Appeals for the Third Supreme Judicial District of Texas (67 S. W. Rep., 348); but upon writ of error to the Supreme Court of Texas, the judgments of the District Court and the Court of Civil Appeals were reversed and judgment rendered for the heirs of Cameron. (95 Tex., 545).

The Supreme Court of Texas in that opinion held that the patents conveyed good title at the time of their issuance to Greer County, Texas.

Upon error in this particular branch of the case the Court of Civil Appeals for the Third Supreme Judicial District of Texas, held that the judgment of the trial Court was without error and the same was affirmed. (R. pp. 27-31). After filing a motion for re-hearing in that Court, (R. p. 32)

which was denied, application was made by Greer County, plaintiff in error, for writ of error from the Supreme Court of Texas to said Court of Civil Appeals (R. pp. 33-40), which application for writ of error was on to-wit: March 12, 1903, refused by the Supreme Court of Texas (R. p. 40); afterwards Greer County perfected its writ of error from this Court to the Court of Civil Appeals for the Third Supreme Judicial District of Texas, assigning the following errors, to-wit:

I.

The Court of Civil Appeals erred in holding by its judgment that the title to the property in issue never vested in Greer County, because at the time the patents to the land in controversy were issued by the express direction and authority of the political departments of the State of Texas, Greer County was de facto, a part of the State of Texas, and was so considered by the State of Texas, and the framers of its constitution; and the State of Texas, under its constitution and laws, had vested title absolute to said land in said Greer County.

II.

The Court of Civil Appeals of Texas further erred in its judgment in awarding the lands in controversy to the State of Texas, and in cancelling the patents to Greer County, for the reason that the undisputed evidence demonstrated that the State of Texas at the time said lands were granted to Greer County was fully aware that a controversy existed between the United States and the State of Texas, as to the ownership of Greer County, and with full knowledge of said controversy, said patents were issued to said Greer County, and the title to said lands thereby vested in Greer County; and the State of Texas, under the law and rules of equity was not authorized to recover the lands so granted, and cancel the titles thereto, under the excuse and pretext that a mistake was made by said State as to the ownership of Greer County.

III.

The Court of Civil Appeals of Texas further erred in affirming the judgment of the District Court of Travis County, and cancelling the patents to said lands because such action was a violation by the State of the Constitution of the

United States of America, in that it impaired the obligation of the contracts evidenced by said patents, and consummated between the State of Texas and Greer County, by the issuance by the State and acceptance by the County of said patents and the grants of lands conveyed thereby.

IV.

The judgments of the District Court of Travis County and of the Court of Civil Appeals aforesaid, are further violative of the Constitution of the United States, in that the effect of said judgments was and is to take the property of Greer County for public use, without making just compensation therefor.

V.

The Court of Civil Appeals of Texas further erred in affirming the judgment of the District Court of Travis County cancelling the patents to Greer County, and awarding said lands to the State of Texas, because the effect of the judgment of the Supreme Court of the United States in deciding that Greer County was not a part of Texas was, in effect, the same as though said county had been ceded by treaty to the United States; and the effect of such cession or of such decision, could not deprive Greer County of its property before that legally acquired.

I.

When a grant is made by a State to an individual or municipal corporation, and the grant is accepted, the contract is complete; and any action by the State through either its legislative, executive or judicial department, which tends to impair the obligation of said contract, is in violation of Sec. 10 of Art. 1, of the Constitution of the United States.

AUTHORITIES.

Fletcher vs. Peck, 6 Cranch, 87-148.
Trust Co. vs. Baltimore, 64 Fed. Rep., 153.
College vs. Woodward, 4 Wheat, 518.
Chicago vs. Sheldon, 9 Wall, 50.

An examination of the case of Cameron's Executors vs. The State of Texas, reported in 95th Texas, page 551, will show that when the land in controversy was patented to Greer County, as a part of Texas, said County took title to the land.

It was further held, in that case, that Cameron, not being a party to the litigation between the United States and the State of Texas, was not affected thereby. It was also held that the title in controversy in that cause, was not different from what it would have been, had Greer County been ceded to the United States, instead of being adjudged a part of its territory by this Court.

The unanswerable logic of this decision shows a valid grant from the State of Texas to Greer County, and that Greer County was not affected by the result of the litigation between the United States and the State of Texas. A grant is a contract, and any attempt by the State of Texas to revoke its grant to Greer County, is, under the agreed facts of this case, an attempt to impair the obligation of the contract evidenced by the grant.

In Fletcher vs. Peck, cited above, the obligation of a contract made by a State in granting land to an individual is fully discussed, and the conclusion is reached that any attempt by the State to avoid its obligation is forbidden by Sec. 10 of Art. 1, of the Constitution cited above.

II.

The grants evidenced by the patents issued by the State of Texas vested title in Greer County, which title so vested was beyond recall by the State through any department of its government, executive, legislative or judicial.

Constitution of Texas, Art. VII., Sec. 6.

Cameron vs. State, 95 Tex., 545.

Milam County vs. Bateman, 54 Tex., 166.

Palo Pinto County vs. Gano, 60 Tex., 251.

The Constitution of Texas (Art. VII., Sec. 6) provides as follows:

"All lands heretofore or hereafter granted to the several counties of this States for educational purposes, are of right the property of said counties respectively to which they were granted, and the title thereto is vested in said counties, and no adverse possession or limitation shall ever be available against the title of any county. Each county may sell or dispose of its lands in whole or in part in manner to be provided by the Commissioners' Court of the county. * * * Said lands and the proceeds thereof when sold shall be held

by said counties alone as a trust for the benefit of public schools therein * * * " (See Revised Statutes of Texas, 1895, p. XXIX). So by this provision of the Constitution it is evident that when the State granted this four leagues of land to Greer County, the title and ownership of said lands, under the Constitution, passed fro mthe State and vested solely in Greer County. This is plainly the purport of the decision of the Supreme Court of Texas in Cameron vs. State, 95 Tex., supra. Long previous to this controversy the Supreme Court of Texas had practically settled the question the same way.

In Milam County vs. Bateman (54 Tex., 165) the Supreme Court of Texas after a review of the various features of legislation pertaining to the county school lands, used this language:

"Section 6, Article VII, Constitution 1876, declatory of the will of the people of the State in convention assembled, as to the status of the title to such property, provides that 'all lands heretofore or hereafter granted to the several counties of this State for education or schools, are of right the property of said counties respectively to which they were granted, and the title thereto is vested in said counties, and no adverse possession or limitation shall ever be available against the title of any county.'

"Taking these several provisions together as construed by the decisions of this Court, it would seem clear that it was the intention of the State to vest the right of property in the school lands in the several counties respectively.

"Counties in their relation toward the State may be viewed in a two-fold aspect: one, which pertains to their political rights and privileges; the other, to their rights of property. Over the former, the legislature as the representative of State sovereignty can exercise such power, unless restricted by the organic law. If it could not exercise such power over the delegated political rights and privileges of counties, which are subdivisions of state governmental authority, we might have a system of petty discordant governments within a government, without unity of design or action."

"Hence the political rights and privileges delegated to counties are not within the constitutional prohibitions against

retroactive laws and those which impair vested rights. Cooley's Const. Lim., 237; People vs. Morris, 13 Wend. 331."

"A different principle, however, obtains as regards the rights of counties to property which they may acquire. Such rights, as a general rule, are protected by the same constitutional guarantees which shield the property of individuals. Cooley's Const. Lim., 237, 277; Grogan vs. San Francisco, 18 Cal., 590.

Even though the State itself may have donated the property, it thereby becomes such vested right as will be protected. Wade on Retroactive Laws, 56; Grogan vs. San Francisco, 18 Cal., 590.

"If given for a specific object, the State may very properly as in the instance under consideration of our school lands granted to counties, exercise such supervision and control over the actions of the counties as to compel the proper execution of the trust, or prevent its being defeated; but it is believed that this control, unless by consent of the county, should be subject to the restriction, that the purpose for which the property was originally acquired, as far as circumstances will admit, be kept in view; and that it shall not arbitrarily be diverted, as in the case before us, to private parties and to a wholly different purpose. Cooley's Const. Lim., 238, and authorities in note 3. In relation to these school lands, the county, though agents for the State, may be compared to agencies coupled with an interest, which cannot be revoked at the pleasure of the principal."

Numerous authorities to the same effect might be multiplied, but in view of the holding of the Texas Court, it is not necessary. Clearly upon the issuance of the patents in the case at bar the full title vested in Greer County, and it is conceded by the agreed statements of facts that the boundaries of Greer County, Oklahoma Territory, are identical with the boundaries of Greer County, Texas; and there has been no change in such boundaries. The same territorial limits and the same population are there to-day practically and substantially as they existed prior to 1895. (R. p. 15).

III.

The rights of private property are never affected either

by cession, conquest, change of sovereignty or otherwise, and the change in such sovereignty never divests rights of property. The decision of this Court in 1895, that Greer County did not belong to Texas, but was a part of the domain of the United States, can therefore have no effect upon the rights of property or grants hitherto made to Greer County by the State of Texas.

United States vs. Roselius, 15 How., 36.
Townsend vs. Greely, 5 Wall., 326.
Dent vs. Emmeger, 14 Wall., 308.
Hardy vs. De Leon, 5 Tex., 234.
Musquez vs. Blake, 24 Tex., 466.
Kilpatrick vs. Sisneros, 23 Tex., 124.
Maxey vs. O'Conner, 23 Tex., 242-3.
United States vs. Percheman, 7 Pet., 51.
Strother vs. Lucas, 12 Pet., 410.
Airhart vs. Massieu, 98 U. S., 496.

In Townsend vs. Greely, supra, it is held that perfect title before cession continued so afterwards, even though the treaty had not so provided, and this rule applied to municipal corporations as to individuals. Even the Texas authorities are to the same effect and sustain the proposition. So far then as the ownership of these lands are concerned, Greer County must be treated as an individual in every sense of the word. The title was in Greer County by act of the State of Texas. The property by virtue of the grant became private property of Greer County, and no subsequent occurrence whereby jurisdiction of the State was lost over Greer County can authorize or justify the State in its attempt to retract its grant, which had been executed by the State's own act, and under the State's own laws. It is submitted, therefore, that under the laws of Texas, as well as under international laws, and the repeated decisions of this Court, the title, as vested, cannot be affected by any act or proceeding on the part of the grantor, as is attempted in this case.

IV.

When the State enters her Courts as a suitor, the same law applies to it as to citizens. The undisputed evidence demonstrates that the State of Texas, through all its departments, executive, legislative and judicial, at the time the lands were

granted to Greer County, was fully aware of the controversy then existing between the United States and the State of Texas as to the ownership of said county, and perfected said grants to Greer County with such knowledge. And where the means of inquiry or knowledge are equally open to both parties, if a mistake occurs without fraud or falsehood, neither party is entitled to relief.

Fristoe vs. Blum, 92 Tex., 80.
Ry. Co. vs. Van Alstyne, 56 Tex., 448-9.
Galveston County vs. Gorham, 49 Tex., 303.
Gilliam vs. Alford, 69 Tex., 271.
Farnsworth vs. Duffner, 142 U. S., 43.
Baltzer vs. Ry. Co., 115 U. S., 634.
May vs. LeClaire, 11 Wall., 217.
Adams Eq., (7 Ed.) 166 et seq. and notes.
Fonb. Eq., 116 and notes.

The Supreme Court of Texas in Fristoe vs. Blum, supra, held that when the State enters her Courts as a suitor, the same law applies to it as to a citizen. This being the case, the same principle which would conclude a private litigant, must conclude the State; and there being no charge of fraud or dishonesty on the part of Greer County, which as a municipal corporation has stood helpless between the contending sovereignties, and the State having acted with full knowledge of the facts, equity will not grant relief to either party. Indeed, the propositions cited may be stated most strongly to the effect, that where the facts are equally unknown to both parties, or when they have equal information, or means of knowledge, or where the facts are doubtful in their own nature, if the parties act in good faith, a Court of equity cannot interfere.

The applicability of this doctrine to the case at bar is manifest. As the record discloses in the agreed statement of facts upon which the case was tried, the State of Texas claimed and asserted ownership of the territory of Greer County since 1836. It created the county by due legislative act with its present boundaries in 1860, and subsequent thereto established its government therein, holding its Courts and establishing and maintaining public schools at the public expense,—having its representatives in its legislature; and

during its assertion of sovereignty made the grants in question, which grants were accepted by Greer County, and presumably devoted to the same purposes for which the grants were made. Greer County has not been at fault in the transaction. Neither have her people, nor her school children. She has been simply a passive spectator of the contest as to sovereignty between the National and State governments. She has been guilty of no fault or fraud. The State of Texas had been fully advised for many long years prior to the grant as to the status of Greer County, and the doubt which must necessarily have obtained as to its proper sovereignty. Having elected to treat the particular territory as her own and to deal with it as her own, in view of these facts the State of Texas is now in no condition to attempt to take advantage of her own mistake. This mistake was hers and cannot be charged to Greer County, nor to her people. Indeed, in view of the record, it might be well asserted that the mistake so made by the State of Texas is a mistake of law and no Court ever relieves a party of a mistake of law. Be it a mistake of law or a mistake of fact, the authorities cited firmly establish the proposition announced, and that the State of Texas cannot be heard to invoke any rule of law or of equity which would authorize her to take advantage of her own mistake, in view of the fact that she did it with her eyes open.

We submit, therefore, with confidence, that the State cannot be heard now to assert ownership or to ask relief upon the record as made.

V.

The grants to Greer County by the State, being in trust for public school purposes, the children of that county became the donees of the charity and their rights and interests cannot be affected by subsequent action on the part of the State as donor. The fact that Texas has lost her dominion over Greer County since the grants were made, cannot enter into the question, as the State thereby is remitted to her action in the proper tribunals, if so disposed, to prevent or correct a perversion or waste of the funds. Property given in charity is always preserved by chancery, and even in cases where the use fails because illegal, the property does not revert, but must be applied as near as practicable to the original inten-

tion.

Dartmouth College vs. Woodward, 4 Wheat, 518.
Fontaine vs. Ravenel, 17 How., 384.
Russell vs. Allen, 107 U. S., 167.
Girard vs. Philadelphia, 7 Wall., 15.
Jones vs. Haversham, 107 U. S., 189.
Mormon Church vs. U. S., 136 U. S., 51.
Croxall vs. Shererd, 5 Wall., 281.

The opinion of the Court of Civil Appeals in the case at bar holds that as the lands were granted for public school purposes and were held in trust by Greer County for such purposes, and as Greer County will not and cannot use them for such purposes within the limits of Texas, the State was entitled to have the patents cancelled and recover the land. (R. p. 30).

In this we submit that the position of that Court is not tenable. It may be assumed without controversy that counties may hold property in trust for the support of schools. (1 Beach on Trusts, Sec. 12, page 19; Parish, etc. vs. Cole, 3 Pick., 232; Perin vs. Cary, 24 How., 575). It is elementary that the disability of the trustee cannot destroy the trust; and the fact that Greer County will not and cannot use the charity for its legitimate purposes within the limits of Texas, cannot affect the question and becomes, we submit, immaterial. The elements of charity all concur in the record here, following the rule laid down by this Court, that the charity must be for the benefit of an indefinite number of persons. (Russell vs. Allen, 107 U. S., 167). This Court is also on record contrary to the position taken by the Court of Civil Appeals of Texas.

In Girard vs. Philadelphia 7 Wall, 15) this Court held that where there was a valid grant to the corporation in trust for charitable purposes, the sovereignty may enforce without perverting the trust; and where the trustee is a corporation no modification of its franchise, its identity remaining, affects its right to hold in trust; nor can a valid vested estate in trust lapse or be forfeited for inability in the corporation to execute the trust. It has also been held in Jones vs. Haversham, 107 U. S., 189, that if the trustee corporation is incapable of executing the trust a Court may appoint a new

trustee; and in Mormon Church vs. U. S., (136 U. S., 51), it has also held that where positive law makes no provision for disposition of the property dedicated to public charitable use, reason and public policy govern. And even in cases where property dedicated to public or charitable uses fails because illegal, the property does not revert, but must be applied as near as practicable to the original intention; and that property given to charity becomes part of the public resources for promoting public welfare, and is preserved by chancery.

It occurs to us, and we submit the proposition with deference, that in so far as this property is concerned, the facts set up by the State and sustained by the Texas Courts are wholly immaterial as affects a proper decision of the question. Texas granted these lands to Greer County. She parted with the title finally and forever. She granted them for public school purposes, which constituted a charitable use or trust. Greer County was capable of receiving the donation for the benefit of the children of that county, and did accept it. The change of sovereignty or of dominion over Greer County cannot change the statue or ownership of the trust property. It is similar in all respects under the law to a cession by Texas of the particular territory of Greer County to the United States, and in that event, had it occurred, Texas certainly could not have sustained a suit for forfeiture of this property, which she herself had devoted to charitable uses for the benefit of the children which at the time she claimed as the children of Texas. Greer County remains in its territorial entity the same that it was before. Presumably her inhabitants are the same. Her children of scholastic age are the beneficiaries in this charitable donation, and the same belongs to them. Their change of allegiance by the decision of this Court cannot be held to affect their rights in this fund without, we submit, overruling all the decisions bearing upon the question.

These authorities which we cite are abundant, and many more to the same effect could be collated, and they all point with unerring significance to the error of the Texas Courts in the ruling of which we complain.

We submit the case and ask of this Court that the judgment of the Court of Civil Appeals for the Third Supreme

Judicial District of Texas be reversed and the cause remanded with direction to that Court to render judgment in favor of Greer County, and that the State of Texas take nothing by its suit.

H. N. ATKINSON,
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Counsel for Plaintiff in Error.

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Supplemental Brief of Plaintiff in Error in Reply to Brief of Defendant in Error.

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It being impracticable for counsel for plaintiff in error to appear and argue this cause at bar, they respectfully submit the following brief in argument, in reply to the brief filed by counsel for defendant in error, the State of Texas.

I.

Counsel for plaintiff in error in their brief (p. 6) in urging that there has been no impairment of the obligation of contract by the decision of the Texas court, and that there is no reference to any legislation affecting the contract, we beg to call attention of the Court to the provisions of the Act of the Legislature of the State of Texas under which this suit was brought. The Act of April 13, 1897, of the Texas Legislature. (General Laws of Texas of 1897, Chapter 72, page 86) provides as follows:

"Section 1. *Be It Enacted by the Legislature of the State of Texas*: That the four leagues of land heretofore patented to what is known as the territory of Greer County for free school purposes, under the provisions

of an Act entitled, "An Act to reserve and set apart three hundred and twenty-five leagues of land heretofore surveyed for the benefit of the unorganized counties as may have located their four leagues of school land, or any part thereof in conflict with valid prior locations or surveys, or which from any cause fail to get title to the four leagues of land they are entitled to under the law," approved April 7, 1883, be and the same is hereby set apart and appropriated for the support and maintenance of the Public Free Schools of this State.

"Sec. 2. That the Attorney-General of the State of Texas is hereby authorized to institute such proceedings as he deems necessary to recover said land against all adverse claims.

"Sec. 3. That all laws and parts of laws in conflict herewith be and the same are hereby repealed."

Counsel for defendant in error omitted to incorporate this statute in their brief, although incorporating some other statutes held relevant to the issues at bar. This statute clearly is a legislative move upon the part of the State of Texas to impair a contract, which the State had entered into with Greer County, and by which she had granted substantially to the children of Greer County four leagues of land, including the lands involved in this controversy.

Apart from that, authorities are not necessary before this Court, in view of the repeated decisions to that effect, that the obligation of the contract may be impaired by an act of either of its departments, executive, legislative or judicial; and the principle has been frequently extended to the impairment of the obligation of the contract by municipal subdivisions of a State. We do not cite authorities because they are familiar to the Court.

So there is nothing in the contention of defendant in error upon this point.

II

The contention of ~~plaintiff~~ defendant in error that although there might have been a cession of the territory of Greer County by Texas to the United States, yet the lands granted to the counties embracing this territory would not have followed

the cession but would have reverted to the State, is not only without authority to support such proposition and none are cited, but is directly against the great mass of authorities to the contrary, some of which cases have been cited in the original brief of plaintiff in error.

It is to be remarked that if this contention, which permeates the whole brief of defendant in error, that Greer County, Texas, was destroyed either by cession or by the decision of this Court in 1895, or as found by the trial Court, that Greer County never in fact had any legal existence, an inquiry is legitimate and arises necessarily upon the record as to why the State should have brought suit against Greer County, Oklahoma, and brought that County into this Court, if it is not the successor of Greer County, Texas, and had no interest in the controversy. The mistake of counsel for defendant in error consists in overlooking entirely the nature and purpose of the grant originally, while, as held by the Supreme Court of Texas in Cameron case, the title did pass by the issuance of patents to Greer County, Texas, yet it is manifest that the grant was to the school children of Greer County inhabiting that territory, and was for their benefit; and it is equally manifest from the authorities cited in the original brief of plaintiff in error that such grant being a charitable use necessarily vested a substantial right in the school children of the particular territory, which no subsequent action of the grantor, either executive, legislative or judicial, could revoke or impair. Counsel for defendant in error do not take the position that a grant of this character by a State, does not come within the category of charitable use, and therefore cannot be administered by a Court of Chancery, but even if such position had been taken it could not be maintained. The authorities all agree that a State may make a grant of this nature impressed with the character of charitable use as well as an individual; and the only intimation to the contrary is found in Perry on Trusts, wherein that author simply states the proposition, that if the legislation by general or State laws establishes schools, also appropriates money therefor and directs by public law how such money shall be raised and expended, such works are not charity within the meaning of the law and Courts of equity

have no jurisdiction to regulate and control them. In support of this proposition the author refers only to the case of Attorney General vs. Heelis, 2 Simmons & Stuart, Ch. Rep., p. 77, but an examination of that case shows that the Court there held distinctly that funds derived from a gift of the crown were charity funds to be administered by the Courts; but if the fund is raised by taxation upon the town for town improvements, the fund is not charitable to be administered by the Courts. (See 2 Perry on Trust, Sec. 707). This is the only case we have been able to find that at all squints at the universal doctrine laid down by all other authorities, and it seems that the text of Perry is not supported by the authorities cited, but on the contrary, the decision in Attorney-General vs. Heelis amply supports the doctrine contended for by plaintiff in error.

We therefore reiterate the proposition contained in our original brief, that this grant was a grant for charitable use and that no matter if Greer County, Texas, ceased to exist, and no matter whether Greer County, Oklahoma Territory, is its natural or legal successor, or otherwise, that it cannot affect the question; in either or both events a Court of Chancery, if necessary, will take charge of the funds and administer them as near as may be possible according to the intention of the grantor.

III.

The appeal of counsel for defendant in error at the close of their brief is as unique as they say the case is. The language of counsel is as follows:

> "This is a unique case so far as the facts are concerned. If the authorities cited in this brief do not afford a precedent for the resuming by the State of her ownership of this land, we submit the case with confidence that the Court in its wisdom will either find a precedent for such action, or, if necessary, will make one."

Counsel ought not to appeal either to the presumed legislative power of the Court or to its sympathies, especially in view of recent congressional action in behalf of defendant in error, which has taken place long after the trial of this cause, and after the preparation of briefs in the case. By the pro-

visions of an Act of Congress, making appropriation to supply deficiencies in appropriations for the fiscal year ending June 30, 1904, and for prior years and for other purposes, approved April 27th, 1904, the State of Texas, the defendant in error, it seems has been thoroughly reimbursed for all its expenditures made in Greer County from the origin of its claim to that County to the termination of such claim in 1895, by the following provision:

> "To pay to the State of Texas as reimbursement to said State for expenses incurred in maintaining a civil government and so forth in what was then known as Greer County, Texas, now known as Greer County, Oklahoma, as shown by reports to the Secretary of the Interior contained in House Document numbered Five Hundred and Seventy-One, Fifty-seventh Congress, First Session, and House Document numbered Five Hundred and Seventy-One, Part Two, Fifty-seventh Congress, First Session, Fifty Thousand, Eight Hundred and Seventy-four and Fifty-three One-hundredths Dollars, and the acceptance of payment hereunder shall be in full for all claims of the character herein provided for by the State of Texas."

Referring back to the reports of the Secretary of the Interior as explanatory of the provision, the Court will find that on April 22, 1902, the Secretary of the Interior as appears in Document numbered Five Hundred and Seventy-one House of Representatives, Fifty-seventh Congress, First Session, submitted his report in accordance with "An Act to provide for the establishment of the intersection of the true one hundredth meridian with Red River, to ascertain the amount of taxes collected by the State of Texas in what was formerly known as Greer County, and the expenditures made on account of said County by said State, and for other purposes," approved January 15, 1901, and which is quoted in length in the report, that Texas filed in that department a statement of her claims, setting forth what lands were patented by the State to Greer County for school purposes; what taxes were collected by the State from inhabitants of Greer County or upon lands or other property located therein from Eighteen Hundred and Sixty to Eighteen Hundred

and Ninety-six; the total amount paid by the State to Greer County for school purposes, other than lands, during that period and the total of all other expenses claimed to have been incurred by the State during that period for the purposes and objects named in said Act of Congress. This claim was allowed in said report of the Secretary of the Interior for the sum of Eighty-eight Thousand, Five Hundred and Sixteen and Thirty-five one-hundredths Dollars. (p. 7). And it was found by the Secretary of the Interior that the State of Texas had received by way of taxes and rental of lands in said County, the sum of Fifty-three Thousand, Nine Hundred and Ninety-three and Fifty-two one-hundredths Dollars, leaving a balance for which the State had compensation the sum of Thirty-four Thousand Five Hundred and Twenty-two and Eighty-three one-hundredths Dollars. (p. 7). The claim of the State is set forth at length in said report on pages 8 to 36, accompanied with vouchers and statements all of which appear itemized and printed.

Subsequent thereto, to-wit: on June 10, 1902, the Secretary of the Interior submitted a report, which is found in House of Representatives, Document Five Hundred and Seventy-one, Part Two, Fifty-seventh Congress, First Session, in which the Secretary upon the further claim of Texas, reporting the decision of the Supreme Court of Texas in case of State of Texas vs. Cameron, and in which the State lost, and which involved the same lands now in controversy here, an additional amount of Fifteen Thousand Seven Hundred and Fourteen Dollars. In said report, the following statement is made:

> "In said original report it was set forth that the State of Texas had patented to Greer County four leagues of land for school purposes, and that said land was sold by the County in two separate tracts, one of 10,476 acres and one of 7,236 acres, at a price of $1.05 per acre; that the present value thereof was $1.50 per acre; that the State had instituted proceedings in the Court to recover the title to said land and that because of the pending litigation the State had not presented a claim for the value of said land. The State has now filed in this department a certified copy of a decision of

the Supreme Court of the State of Texas rendered May 29, 1902, against the State, and in favor of the grantee of the County for the tract of land, containing 10,476 acres; the value of this land at $1.50 per acre is $15,714."

The Secretary of the Interior thereupon introduced the other items, reported as due to the State of Texas in the sum of $15,714, which, added to the original amount of $34,522.83, and a small amount of $637,70, making the sum of $50,874.53, which is carried forward in the appropriation bill hereinbefore set out, and which amount the State of Texas has received from the United States government.

It will appear from this report, page 2, that Greer County had sold all the land received by it from the State of Texas before the decision of this Court establishing that territory as a part of the United States and not of Texas, which fact also appears on page 11 of Document numbered Five Hundred and Seventy-one, House of Representatives, Fifty-seventh Congress, as stated in the application of the State for reimbursement from the following paragraphs:

"On the 12th day of January, 1888, under the authority of an order of the Commissioners' Court of said Greer County, F. B. Duke, county judge of said county, sold and conveyed to D. W. Strain and A. C. Swinburne 10,476 acres of said lands at the price of $1.05 per acre, in the aggregate $11,000, in cash, as recited in said deed, and in the proceedings of said Commissioners' Court.

"It further appears from said Court proceedings that the amount of $11,000 was, by the officers of the County, invested in the purchase of $11,000 of the bonds of the County issued for the purpose of building a jail.

"The balance of said four leagues, 7,236 acres, was also sold to said Strain and Swinburne under authority of an order of said Commissioners' Court for $1.05 per acre, in the aggregate $7,597.80. No part of the purchase money was paid in cash, but a note with vendor's lien was executed for the purchase money, and afterwards, upon judgment and foreclosure of lien, the land was sold and bought in by Greer County, and by proper sheriff's deed the title to this 7,236 acres was revested in Greer County.

"After the decision of the Supreme Court of the United States in the case of the United States vs. Texas (162 U. S. 1) the legislature of the State of Texas passed an act appropriating the four leagues of Greer County school lands aforesaid to general free school purposes, and directed the Attorney-General of the State to bring suit for the same.

" Under the provisions of this act suit was instituted in the District Court of Travis County, Texas, by the Attorney-General against Greer County, Oklahoma, and William Cameron, who had bought the 10,476 acres from Strain and Swinburne, for the entire four leagues. Upon a trial in the District Court of this cause the State recovered against Greer County, Oklahoma, the 7,236 acres, from which judgment no appeal was prosecuted, and against William Cameron for the 10,476 acres, from which judgment appeal has been taken and perfected, and this cause is now pending in the Court of Civil Appeals for the Third Judicial District.

" Under the laws of Texas the judgment aforesaid against Greer County, Oklahoma, may be taken into the Court of Appeals upon writ of error at any time within one year from the date of the judgment of the District Court.

"The State of Texas makes no claim for and on account of the four leagues of school land patented to Greer County, aforesaid, at this time, for the reasons above set out, but prays to be allowed the right to present a claim, under the act of Congress under which this proceeding is had, for the value of whatever part, if any, of said land she may ultimately lose by final judgment of her Courts in the causes aforesaid."

These facts are plain from this:

(1) That the land sued for in this case, to-wit: 7,236 acres, was sold by Greer County when she was a part of Texas to Strain and Swinburne, but that afterwards Greer County by foreclosure of the vendor's lien bought in this 7,236 acres again and title was revested in Greer County.

(2) The balance of the land, 10,476 acres, became the property of Cameron and were involved in the suit decided adversely to the State in Cameron vs. State, 95 Tex., 545. The Supreme Court of Texas holding in that case that the patents were valid and passed the title to Greer County, and

that the Cemerons held superior title to the State.

(3) That the State of Texas has been reimbursed not only for every expenditure made by her in Greer County during the existence of her claim to that County, but had been even reimbursed by the government for the 10,476 acres of these lands owned by the Camerons; and it was, at least, inferable that in case she does not prevail in her suit in this cause the government will be equally beneficent and liberal and reimburse her, if she asks for it, for the value of these lands.

We have taken the liberty to refer to these public records of the executive department upon the supposition that the Court would take judicial notice thereof.

N. Y. Indians vs. U. S., 170 U. S., 22-42.
Heath vs. Wallace, 138 U. S., 584.
Underhill vs. Fernandez, 168 U. S., 253.
The Paquelle-Habina, 175 U. S., 700.
Jones vs. U. S., 137 U. S., 216.
Kennett vs. Chambers, 14 How., 47.
U. S. vs. Leschmaker 22 How., 405.
Romero vs. U. S., 1 Wall., 742.
The Delaware, 161 U. S., 473.

We submit the cause upon all the propositions stated in the original brief of plaintiff in error as well as in this supplemental brief, and reiterate that this grant by Texas was irrevocable, no matter what became of Greer County, in that it was a donation for charitable use and that the State of Texas can take no action by which said lands can revert to defendant, but that the lands are funds created thereby and must be and remain the property and for the use and benefit of the school children of Greer County, who are the beneficiaries under the donation; and that the extent to which Texas can go in the matter is by proper judicial proceedings in equity to see that the charity is duly administered in accordance with the intention of the original donation.

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